United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 30, 2002

TO : Rochelle Kentov, Regional Director
Margaret Diaz, Regional Attorney
Karen K. LaMartin, Assistant to Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Maytag Aircraft Corp.
Cases 12-CA-21702, 21779, 21912, and 21961

506-6050-7500
506-6050-7560
512-5036-6733
512-5036-6762

These Section 8(a)(1), (3) and (5) cases were submitted for advice as to (1) whether bargaining unit employees engaged in a protected strike where the strike could have affected a scheduled Space Shuttle launch; (2) whether the Employer unlawfully locked out striking employees; and (3) whether the Employer unlawfully refused to reinstate striking employees following their unconditional offer to return to work.

We conclude that the December 4, 2001,[1] strike was protected activity since the employees had taken all necessary precautions related to the safety of the government operation on which they worked. We also conclude that based on the totality of Employer conduct and statements, it unlawfully locked out employees to pressure them to abandon the Union, and therefore the Employer violated Section 8(a)(3) by refusing to accept striking employees' unconditional offers to return to work.

FACTS

The Employer is a U.S. government subcontractor,[2] providing fueling services to the United States Air Force at Patrick Air Force Base and NASA at Cape Canaveral Air Station in Florida. It took over fueling operations at Patrick and Cape Canaveral on July 1 from United Paradyne Corp., the previous fueling services provider. About that time, the Employer hired 12 former Paradyne employees to staff its initial employee complement at Patrick and Cape

[1] All dates are in 2001 unless otherwise noted.

[2] As a government subcontractor, the Employer is subject to the Federal Service Contract Act, 41 U.S.C. 351, et seq.

Canaveral. Paradyne employees were represented for collective bargaining purposes by Transportation Workers Union of America, Local 525, and on July 3, the Employer voluntarily recognized the Union as the collective bargaining representative of fueling service employees.[3]

Almost immediately after recognizing the Union, the Employer made clear to unit employees that the Employer was not interested in reaching an agreement with the Union. For example, on numerous occasions between taking over the operation on July 1 and the parties' initial bargaining session on July 31, Operations Manager Castillo told employee and Union Section Chair Loucks that the Employer did not want to negotiate with the Union.

At the July 31 bargaining session, the parties met, but made little progress. The Union rejected the Employer's proposed ground rules for negotiations, citing its need for flexibility in negotiations. Employer Vice President Nelson responded by telling Union representatives that he was only at the meeting because the law forced him to be there and the Air Force did not want labor problems. Union president Hunt accused the Employer of bargaining in bad faith, claiming that Nelson had refused to return Hunt's phone calls. Nelson denied the accusation and the meeting quickly deteriorated. Before the meeting adjourned, however, the Union presented its proposal, which Nelson agreed to review that evening and respond to the next day.[4]

After the July 31 meeting, Castillo and Nelson continued to tell employees that they would not deal with the Union. As Castillo left the July 31 meeting, he told two employees that Nelson would not negotiate with Hunt. The next day, Castillo and Nelson each told an employee it would be difficult to deal with Hunt based on his behavior at the July 31 meeting. Between July 31 and October 1, Castillo told employees on several occasions that they ought to "change unions."

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[3] The Region has concluded that the Employer is a successor employer under NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

[4] The parties did not meet again for substantive bargaining until January 7, 2002. A September 12 meeting was cancelled due to travel restrictions implemented after the terrorist attacks of September 11. Telephone and facsimile miscommunication and noncommunication, attributable to both the Union and the Employer, prevented the two sides from agreeing on additional meeting dates.

Some time in late August, the Employer unilaterally raised employees' insurance premiums without giving notice to the Union. The Union demanded that the Employer delay any action until the parties bargained over the matter. The Employer initially agreed to bargain, but then unilaterally implemented the changes without bargaining.

On September 2, Castillo spoke separately with two employees. During each of these conversations, Castillo gave the employee the telephone number for the Regional Office, telling him that employees should "change unions" and directing him to call the Regional Office to find out how to get rid of the Union.

About mid-November the Employer made additional unilateral changes to unit employees' benefits. As with the August change to insurance premiums, the Employer did not notify the Union of the changes, nor provide the Union with an opportunity to bargain over the proposed changes.

On December 3, Nelson spoke to Loucks about "changing unions." Nelson gave Loucks the name and direct telephone number for the Board agent handling a related representation case. Nelson told Loucks that the International Association of Machinists were organizing unrepresented airfreight employees and that Nelson wanted fueling employees to "change unions" so Nelson could cross-utilize unit employees and airfreight employees.

Later on December 3, the Union held a meeting for unit employees to discuss whether employees wanted to strike the Employer. At that meeting, employees discussed the Employer's alleged unfair labor practices, including the Employer's unilateral changes and alleged bad faith bargaining.[5] After consulting with the Union's attorney, the employees voted to strike.

Subsequent to the vote, Loucks advised the Employer that the employees would strike at around noon on December 4. By letter dated December 3, Employer President Silva advised Hunt that the Employer had decided to lock employees out until the parties executed a collective bargaining agreement.[6]

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[5] It is unclear what other subjects, if any, the employees discussed.

[6] It is unclear whether Silva sent his December 3 letter to Hunt or any employee prior to the strike. The thrust of Silva's letter, however, was quoted in a related newspaper article published December 4.

Unit employees reported to work as usual on December 4 and completed their assigned tasks before 1 p.m.[7] At approximately 12:55 p.m., Loucks contacted Castillo and told him that unit employees would walk out at 1 p.m. When asked how long employees might be out, Loucks told Castillo the strike could last "maybe an hour, maybe a day."

On the next day (December 5), the employees reported to work as scheduled. At that time, the employees were given copies of a letter stating that they would be locked out until the parties reached a collective bargaining agreement; Castillo also read employees a statement to that effect. Later that morning, Loucks contacted Silva at the Employer's offices in Colorado Springs to see whether employees could return to work. Silva told Loucks that he was unaware the strike was officially over and, given the uncertainty surrounding whether the Union would strike again, the Employer had chosen to lock out the employees. Loucks offered to provide the Employer with a no-strike agreement effective through the parties' next bargaining session, but Silva did not accept. Silva told Loucks that employees could return to work if the company's attorney would tell him how to bring them back without the Union, and if employees dropped their unfair labor practice charges.

By letter dated December 6, Hunt wrote the Employer to reiterate and clarify the employees' December 5 offer to return to work. The Employer did not agree to reinstate the striking employees until July 23, 2002, when it reached a collective bargaining agreement with the Union.

The Region has concluded that the employees' strike was a protected unfair labor practice strike from its inception. The Region has further concluded that the Employer engaged in bad faith bargaining prior to the strike, violated Section 8(a)(5) and (1) by its unilateral changes of late-August and mid-November, and unlawfully solicited employees to oust the Union on September 2 and December 3.

ACTION

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[7] The Employer claims that employees did not adequately fuel two trucks several days before the strike and, by striking, employees were not available to perform Shuttle-related tasks scheduled for later in the day on December 4. There is no evidence, however, that employees failed to perform all tasks scheduled to be completed before 1 p.m. on December 4.

We agree with the Region that the December 4 strike was protected activity, and conclude that the Employer unlawfully locked out employees to pressure them to abandon the Union. We base our conclusion on the Employer's entire course of unlawful conduct, including telling employees that the Employer did not want to, and indeed would not, negotiate with the Union; encouraging employees to abandon the Union or "change unions"; and telling employees the Employer would end its lockout, but only if the Employer could find a way to bring employees back to work without the Union, and if employees dropped their pending unfair labor practice charges. We further conclude that the Employer violated the Act by refusing to accept striking employees' unconditional offers to return to work.

A. The Employees' December 4, 2001, Strike Was Protected Activity.

It is well established that employee walkouts or work stoppages are protected if they arise from a controversy concerning the terms and conditions of their employment.[8] However, the right to strike is not absolute, but rather is limited by a "duty to take reasonable precautions to protect the employer's physical plant from such foreseeable imminent damage that would result from their sudden cessation of work."[9] Employees who breach this duty engage in unprotected activity for which they may be disciplined or discharged.[10] However, employees are only required to take reasonable precautions; they are not required to act as their employer's insurer or take every possible precaution to secure the employer's property for an indefinite period of time.[11] Indeed, the Board has found certain walkouts involving some foreseeable risk of damage to the employer's property or operation to be protected,

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[8] See, e.g., Millcraft Furniture Co., 282 NLRB 593, 595 (1987): "It is well settled that a concerted employee protest of supervisory conduct is protected activity under Section 7 of the Act." See also Arrow Electric Co., 323 NLRB 968, 970 (1997) enfd. 155 F.3d 762 (6th Cir. 1998) citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); Trident Recycling Corp., 282 NLRB 1255, 1261 (1987); Dirt Digger, Inc., 274 NLRB 1024, 1027 (1985).

[9] Marshall Car Wheel and Foundry Co., 107 NLRB 314, 315 (1953), enf. denied 218 F.2d 409 (7th Cir. 1955).

[10] Id. at 315.

[11] Reynolds & Manley Lumber Co., 104 NLRB 827, 828-829 (1953), enf. denied 212 F.2d 155 (5th Cir. 1954).

where the employees took reasonable precautions, even where employees gave their employers little or no advance notice.[12]

Here, if employees failed to fuel vehicles, surveillance aircraft, and search and rescue aircraft, they would have endangered the safety of Air Force and NASA personnel and certain aspects of a particular mission. Therefore, unit employees had a duty to take reasonable precautions before walking out. We conclude that the striking unit employees in fact did take any necessary precautions to ensure the aircraft and vehicles were properly fueled before walking out. The Union provided the Employer with notice of the potential strike the day before employees walked out. Employees also delayed their strike by nearly an hour in order to complete all scheduled tasks associated with the Shuttle launch.[13] Finally, the employees struck nearly five hours before the scheduled launch, at a time when the Employer had ample personnel available to complete any remaining fueling tasks. In these circumstances, we conclude that unit employees took reasonable precautions before striking and, therefore, that the strike was protected activity.[14]

B. The Lockout Was Designed to Pressure Employees to Abandon the Union and, therefore, Unlawful from its Inception.

An employer may lawfully lock out its bargaining unit employees for "legitimate and substantial business reasons."[15] Thus, employers may temporarily lock out employees to pressure them to accept lawful bargaining

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[12] See e.g., Columbia Portland Cement Co., 294 NLRB 4l0, 422 (l989), modified on other grounds 9l5 F.2d 253 (6th Cir. l990) (strike protected where employees gave less than 30 minutes notice and took reasonable precautions, notwithstanding damage to equipment).

[13] The Employer claims, [*FOIA Exemptions 6, 7(c)and (d)*] that employees struck before fueling rescue helicopters, surveillance aircraft, and two refueling trucks. There is no evidence, however, that employees failed to perform tasks scheduled to be completed prior to 1 p.m.

[14] Columbia Portland Cement, supra at 422.

[15] Eads Transfer, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993), citing Laidlaw Corp, 171 NLRB 1366, 1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

proposals,[16] or to avoid anticipated disruption caused by future strikes.[17] Moreover, a lockout may be legal, despite an employer's unremedied unfair labor practices, if the purpose of the lockout is to support a legitimate bargaining position and the lockout is not materially motivated by the unfair labor practices.[18] However, an employer violates the Act if a purpose of the lockout is to discourage union activity, or is "inherently so prejudicial to union interests and so devoid of economic justification that no specific evidence of intent . . . is required."[19] If the lockout has both lawful and unlawful objectives, it violates the Act[20]

The evidence here demonstrates that the Employer unlawfully locked out the employees to pressure them to abandon the Union.[21] Immediately after the Employer took over the fueling operations, Castillo began telling employees that the Employer did not want to bargain with the Union or Hunt.[22] At the parties' first negotiating

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[16] Tidewater Construction Corp., 333 NLRB No. 147 slip op. at 1 (2001), citing American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

[17] See Bali Blinds Midwest, 292 NLRB 243, 246-247 (1989) overruled on other grounds sub nom. Electronic Data Systems Corp, 305 NLRB 219 (1991) (partial lockout lawful where object was to avoid potential disruption of future strikes and meet production goals). See also, Harter Equipment, 280 NLRB 597 (1986), enfd. Local 825 IUOE v. NLRB, 829 F.2d 458 (3d Cir. 1987).

[18] Delhi Taylor Refining Div., 167 NLRB 115, 117 (1967), enfd. 415 F.2d 440 (5th Cir. 1967), cert. denied, 397 U.S. 916; United States Pipe & Foundry, 180 NLRB 325, 328-29 (1969), enfd. 442 F.2d 742 (D.C. Cir. 1971).

[19] American Ship Building v. NLRB, above, 380 U.S. at 311. See Ancor Concepts, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999); Eads Transfer, 304 NLRB at 712; Schenk Packing, 301 NLRB 487, 489-490 (1991); McGwier Co., 204 NLRB 492, 496 (1973).

[20] Movers and Warehousemen's Assn. of Washington, D.C., 224 NLRB 356 (1976), enfd. 550 F.2d 962, 966 (4th Cir. 1977); Wire Products Manufacturing Corp., 198 NLRB 652 (1972) enf. denied in relevant part 484 F.2d 760 (7th Cir. 1973).

[21] See Wire Products, above, 198 NLRB at 653.

[22] Id. at 653.

session, Nelson told Union negotiators that he was only there because the law "forced" him to be there. Nelson and Castillo then initiated conversations with employees about "changing unions," directing those employees to contact the Regional Office and take whatever action necessary to get rid of the Union.[23] The Employer also made significant unilateral changes to employees' benefits.[24] When the striking employees offered to return to work, Employer president Silva unlawfully conditioned their return on their willingness to drop the pending unfair labor practices.[25] Finally, and perhaps most significantly, Silva told employees they could return to work if they came back without the Union.[26] Under these circumstances, we conclude that the Employer unlawfully locked out the employees in order to destroy employee support for the Union.[27]

Since it had unlawfully locked out the employees, the Employer was not privileged to reject their December 5 and 6 unconditional offers to return to work. Thus, the Employer had not yet hired replacement workers, relying instead on local supervisors and employees from other

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[23] See, e.g., Eastern States Optical Co., 275 NLRB 371 (1985) (unlawful for an employer to initiate a decertification effort). See also Central Washington Hospital, 279 NLRB 60, 64 (1986) and cases cited therein.

[24] See, e.g., NLRB v. Katz, 369 U.S. 736 (1962) (unilateral changes in wages and working conditions, without prior consultation with the employees' bargaining representative, "must of necessity obstruct bargaining, contrary to the congressional policy" and is a violation of Section 8(a)(5) of the Act, even "without also finding the employer guilty of over-all subjective bad faith"). See also, Suzy Curtains, 309 NLRB 1287, 1300 (1992) (employer's unilateral changes seriously undermined the collective bargaining process and employees' support for the Union).

[25] See, e.g., Isla Verde Hotel Corp., 259 NLRB 496, 503 (1981) enfd. 702 F.2d 268 (1st Cir., 1983) (employer unlawfully conditioned reinstatement on strikers' willingness to waive their rights before the Board and other administrative agencies). See also Mandel Security Bureau, 202 NLRB 117, 119 (1973) (employer unlawfully conditioned employee's reinstatement on his willingness to withdraw pending unfair labor practice charges and waive his right to file future charges).

[26] Wire Products, 198 NLRB at 653.

[27] Id.

locations to perform unit work. Therefore, the Employer was obligated to accept the employees' unconditional offer to return to work, regardless of whether or not they were unfair labor practice strikers.[28]

Accordingly, consistent with the foregoing analysis, the Region should issue Section 8(a)(3) allegations in its complaint, absent settlement.

B.J.K.

[28] See e.g., Matador Lines, Inc., 323 NLRB 189, fn. 2 (1997) (employer's refusal to accept employees' unconditional offer to return to work prior to hiring replacement workers violative).